National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 15, 1998

TO: Elizabeth Kinney, Regional Director, Region 13

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Lift Systems, Inc., Case 13-CA-37076

518-4040-5000

This case was submitted for advice regarding whether the Employer violated Section 8(a)(2) by granting recognition to the Union where, in part, the Union based its claim of majority support on its conversations with employees.

FACTS

Local 150, Operating Engineers ("Union") has been attempting to organize employees who work in the lift truck industry in the Chicago area. On September 17, 1997,(1) the Union requested voluntary recognition by Lift Systems, Inc. ("Employer"), claiming that a majority of employees had signed authorization cards. The Union filed a representation petition the same day, and a hearing was set for October 3.(2) On September 24, the Union began recognitional picketing of the Employer's facility and ambulatory picketing of the Employer's drivers during deliveries to customers. The Union also requested that customers refuse delivery of the Employer's lift equipment. In September, the Union also filed Section 8(a)(1) charges against the Employer for threatening employees for wearing union insignia,(3) and for having Union representatives arrested and threatening them with arrest.(4) The filing of these charges led to the indefinite postponement of the hearing on the Union's election petition.

On December 6, the Union again requested that the Employer voluntarily recognize the Union based on signed authorization cards and other evidence. Without reviewing the authorization cards, on December 11 the Employer and Union signed an agreement recognizing the Union as the Section 9(a) representative of bargaining unit employees. The bargaining unit consisted of 32 employees when the Union was recognized.

The Union based its December 1997 request for voluntary recognition on having obtained 12 signed authorization cards and its conversations in November and December with 15 employees who apparently stated that they supported the Union. The Union supplied affidavits indicating the identity of each employee who expressed support for the Union, the date of each conversation, and the manner in which each employee indicated his support.

The Region interviewed 12 of the 15 employees whom the Union said had expressed support for the Union. The Region concluded that five of these employees had unconditionally expressed support for the Union (although one had already signed a Union authorization card), one denied saying he supported the Union, and five were equivocal in their support for the Union (three conditioned their support on the Union obtaining certain contract proposals, two said they would "go with the flow"). The Region was unable to contact three employees identified by the Union as Union supporters.(5) The Region also determined that one of the employees who had signed an authorization card was not in the bargaining unit.

In January 1988, the Employer met with Randall Truckenbrodt ("Charging Party"), who owned a competing lift truck business which the Union was also trying to organize.

The Employer informed the Charging Party that it knew its employees did not favor the Union, and that it recognized the Union for business reasons. The Employer said its two main customers were going to be involved in a big job at an auto plant in Janesville, Wisconsin, and that if the Employer was not unionized the customers were not going to be able to use the

Employer.

On May 15, 1998, the Charging Party filed the instant charge against the Employer alleging that the Employer and Brambles Equipment, another employer in the lift truck industry, had unlawfully recognized the Union.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the charge that the Employer unlawfully recognized the Union, as there is insufficient evidence that the Union lacked majority support when it was recognized as the Section 9(a) representative.

A.The Union Lawfully Based its Request for Voluntary

Recognition on Employees' Oral Expressions of Union Support

In Regency Gardens Co.,[(6)] the Board specifically held that union recognition may be based on oral expressions of union support. In that case, the Board held that an employer did not violate Section 8(a)(2) when it recognized a union which claimed that a majority of unit employees had expressed a desire "'to be with Local 5' and would sign cards for the union. . . ."[(7)] The Board expressly noted that "there is no requirement that a union must have, and show to an employer, a majority of signed cards before a union may be lawfully recognized by an employer."[(8)] In reaching its decision, the Board agreed with the ALJ that the "General Counsel did not prove that the Respondent Union did not represent a majority" of unit employees.[(9)] The ALJ noted that the General Counsel had not presented any testimony that would show that the union did not represent a majority of the workforce or that the union had not been organizing workers.[(10)]

Applying Regency Gardens, the Union here was warranted in requesting voluntary recognition based, in part, on employees' oral expressions of unequivocal support for the Union. However, in agreement with the Region, we conclude that the Union was not warranted in relying on employee statements expressing only equivocal support for the Union. In this regard, we note that in dismissing the Section 8(a)(2) charges in Regency Gardens, the Board noted that a majority of employees expressed unequivocal support for the union; they said that they wanted "to be with" the union and were willing to sign authorization cards. This is consistent with the requirement that a union demonstrate "convincing" employee support in order to justify voluntary recognition.[(11)]

A requirement that union support be unequivocal in order for a union to rely on it for purposes of recognition is also consistent with the Supreme Court's Allentown Mack decision,[(12)] which held that an employer may withdraw recognition of a union based on any evidence that leads to a reasonable uncertainty about whether employees support the union, such as unsubstantiated assertions that others do not want union representation. If an employee expresses only equivocal support for a union, then the employee has also expressed some reservation or doubt about union representation. Since Allentown Mack holds that an employer would be warranted in relying on that such a statement to withdraw recognition, it would be anomalous to allow a union to rely on that same statement to obtain initial recognition by the employer.

Here, the Region determined that only five employees verbally expressed unequivocal support for the Union. One of those employees, along with ten others, signed authorization cards. Thus, 15 employees unequivocally supported Union representation. However, five other employees were found to have offered only equivocal verbal support for the Union; either saying they would "go with the flow" or conditioning their support for the Union on its ability to obtain certain contractual benefits. Since there is a reasonable uncertainty about whether they supported the Union, the Union could not rely on their statements in determining majority status prior to its request for recognition.

In addition, the Union was entitled to rely on employees' decision to strike for recognition as evidence of support for Union recognition.[(13)]

B.There is no Prima Facie Evidence that the Union Lacked Majority Support

In order to find a violation of Section 8(a)(2), it is the General Counsel's burden to prove by "'more than conjecture'" that the union lacked majority support when it was recognized by the employer.(14) In applying this principle, however, the Board has held that it is not always incumbent upon the General Counsel to affirmatively prove, with anything approaching mathematical precision, that a union did not represent a majority at a critical time, if there is evidence in the record which reasonable tends to cast doubt upon the majority status claimed by the union.(15)

The Board has held that the General Counsel has met its burden where there are specific instances of coercion which indicate widespread undue influence,(16) lack of any evidence of a union organizing campaign,(17) a pattern of denial of employee rights,(18) or historical exclusion from the bargaining unit where the union sought an accretion.(19)

The General Counsel's burden is not satisfied by mere argument that the union lacked documentation of its claim of majority support. In Woodcliff Lake Manor Nursing Home, Inc.,(20) the General Counsel did not meet its burden of proof of lack of majority status by simply asserting that the union lacked documentation. Noting that in a Section 8(a)(2) case the union does not bear the burden of absolving itself of allegations of unlawful conduct, the ALJ declined to draw an inference of lack of majority support from the fact that the union's "suspicious" but not "implausible" claim that the fifty signed authorization cards, and a sheet against which they were checked, were lost in a flood, where there was no allegation of coercive conduct and the General Counsel had only produced the testimony of one employee that had not signed an authorization card.(21)

We conclude that there is no prima facie evidence that, as a matter of fact, the Union lacked majority support. The Union possessed eleven authorization cards signed by bargaining unit employees and could rely on the unequivocal expressions of support of four additional employees. Thus, as a matter of fact, 15 employees out of a bargaining unit of 32 supported the Union at the time it was recognized by the Employer. More importantly, the Union claims that three additional employees also expressed support for the Union, which if added to the other employee complement provides a clear majority of support for Union representation. Since, after investigation and attempts to contact these employees, there is no evidence that these employees did not unequivocally support the Union, there is no other reason for doubting that employees voluntarily supported the Union (e.g., coercion to obtain Union support), and there is additional evidence of Union support due to the strike, we cannot meet our burden of proof to show that the Union lacked majority support when it was recognized by the Employer.

CONCLUSION

For the foregoing reasons, we conclude that, absent withdrawal, the Region should dismiss the charge that the Employer unlawfully recognized the Union, as there is insufficient evidence that the Union lacked majority support when its was recognized as the Section 9(a) representative.

B.J.K.

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[1] **All dates refer to 1997 unless otherwise noted.**

[2] **Case 13-RC-19726.**

[3] **Case 13-CA-36412, filed September 24, 1997.**

[4] **Case 13-CA-36413, filed September 25, 1997.**

[5] **The Region also contacted one employee who was selected at random. That employee said he had never indicated support for the Union.**

[6] **263 NLRB 1265 (1982).**

[7] **Id.**

[8] Id.

[9] Id. See also NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969) ("Almost from the inception of the Act, [the Board] recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means . . . by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes."); United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 74 (1956) (the Act "leaves open the manner of choosing [employees' exclusive bargaining] representatives when certification does not apply").

[10] Id. at 1269. Accord: Teamsters United Parcel Service National Negotiating Committee v. NLRB, 17 F.3d 1518, 1523 (D.C. Cir. 1994) (in dictum, the court noted that a union representative's request for recognition based on conversations with employees, and without any documentary or other evidence of these conversations, would warrant employer voluntary recognition of the union), cert. denied, 513 U.S. 1076 (1995).

[11] Gissel Packing, 395 U.S. at 596-97.

[12] Allentown Mack Sales and Service, Inc. v. NLRB, 118 S. Ct. 818, 824 (1998).

[13] See Gissel Packing, 395 U.S. at 597, 597 n.10 (citing Century Mils, Inc., 5 NLRB 807, 812 (1938)); see also Pacific Abrasive Supply Co., 182 NLRB 329, 330-31 (1970) (Board imposed a Gissel bargaining order where the employer refused to bargain with a union despite "demonstrations of employee sentiment" which corroborated the union's claim of majority status: verified authorization cards, employer discussions with employees, and a strike by all unit employees).

[14] Teamsters Negotiating Committee, 17 F.3d at 1523 (citations omitted). Accord Fountainview Care Center, 317 NLRB 1286, 1289 (1995) (quoting Siro Security Service, Inc., 247 NLRB 1266, 1271 (1980) ("The burden is on the General Counsel to establish that the union does not represent a majority of the employees at the time of recognition. Circumstantial evidence amounting to nothing more than conjecture, is not a substitute for proof of lack of majority. . . .").

[15] Rainey Security Agency, Inc., 274 NLRB 269, 279 (1985).

[16] See, e.g., Clement Bros. Co., 165 NLRB 698, 699 (1967) (evidence that seven of 129 authorization cards were obtained through coercion, in a unit of 129 employees, and that coercion continued after contract was signed rebutted presumption of majority support), enf'd, 407 F.2d 1027, 1029 (5th Cir. 1969).

[17] See, e.g., Bronxwood Home for Adults, 244 NLRB 905, 905 (1979) (lack of any organizing activity satisfied General Counsel's burden of proof that union lacked majority support when recognized by the employer).

[18] See, e.g., Rainey Security, 274 NLRB at 280-82 (new applicants informed that they must join the union and coerced them to sign union checkoff forms, and evidence indicated that either the union never obtained union authorizations or did so only through improper employer influence); Siro Security, 247 NLRB at 1273 (totality of circumstances rebutted union's claim of majority support, including employer's haste in recognizing the union without verifying the authorization cards, employer assistance in obtaining authorization cards and requirement that cards be signed as a condition of employment, fraud in obtaining signed authorization cards, and unlawful application of union security clause).

[19] Teamsters Negotiating Committee, 17 F.3d at 1523 (union's lack of any documentary or other evidence to support its claim that a majority of employees had verbally expressed support for the union did not establish majority support).

[20] 276 NLRB 752, 756 (1985).

[21] See also Teamsters Negotiating Committee, 17 F.3d at 1523 (in dictum, rejecting General Counsel's argument that it met its burden of proof of lack of majority status by establishing that the union lacked record evidence of the its conversations with employees who supported the union).